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NO. 93-967

In the Supreme Court of the United States

OCTOBER TERM, 1993

ZAPATA GULF MARINE CORPORATION,
Petitioner,

vs.

BETTY U. CHAISSON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

1. Can a district court's local rules and standing order circumvent the discovery mandates imposed by Rule 26 *et. seq.* of the Federal Rules of Civil Procedure?

2. Does Rule 26, *et seq.* of the Federal Rules of Civil Procedure mandate pretrial disclosure of the existence and contents of surveillance evicence which is primarily substantive in nature?

3. Did the Fifth Circuit err in its determination that the surveillance video of the plaintiff/respondent was primarily substantive in nature and that the failure of the defendant to disclose the existence of this evidence prior to trial constituted reversible error.

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NO. 93-967

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ZAPATA GULF MARINE CORPORATION,

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STATEMENT OF THE CASE

The Statement of the Case submitted by the petitioner contains a very serious misstatement of fact when characterizing the nature of the surveillence video at issue in this proceeding. The petitioner asserts that "**(T)he video tape of the surveillance of the respondent *clearly impeached* her pretrial testimony... (and)showed the respondent performing various routine daily activities... which were clearly the types of activities the respondent had *denied* she was able to perform.... The video tape clearly contradicted the respondent's trial testimony where she claimed that she was in need of neck surgery.**" (*Petition for Writ Certiorari*, pp. 4-5)

In commenting on the nature of the tape in its original decision, the Fifth Circuit noted that:

> **"...Chaisson testified at trial that her injuries have interfered with her daily activities because she 'can't do anything for too long of a period of time. If (she does), then it starts acting up.' She reiterated that activity 'starts to aggravate (her) problem.' Zapata contends that the video tape of Chaisson shopping and working under her car contradicts these statements, and, therefore, discredits her testimony. As such, it labels the tape impeachment evidence.**
>
> **"Having reviewed the video tape, as well as Chaisson's testimony, we are not convinced that the former makes the latter less believable. Chaisson testified only that she is unable to carry on daily activities without pain, not that she is entirely unable to do so. The tape shows her carrying on daily activities. It was taken at some distance and has no sound component. It requires quite a leap to conclude that because she engages in routine activities, *ergo*, she does so without pain. In short, we question whether the proffered videotape discredits her testimony at all."** ***Chaisson v. Zapata Gulf Marine Corporation,*** 988 F.2d 513, 517 (5th Cir., 1993).

The Fifth Circuit reiterated this determination in its denial of Zapata's request for a rehearing:

> **"... the surveillance evidence should have been disclosed during discovery because it was not used solely for impeachment as the local rules re-**

> **quire. The impeaching value of the evidence was minimal, whereas the evidence was probative on a central substantive issue in the case — plaintiff's physical condition.** ***Chaisson v. Zapata,*** 3 F.3d 123, 124 (5th Cir. 1993).

The distinction between the Fifth Circuit's characterization of the video tape and petitioner's characterization is of vital import to this Court, not only with respect to whether or not certiorari should be granted in this case, but also with respect to whether or not this Court wishes to narrow or restrict the provisions of Rule 26 with respect to evidence that is primarily substantive in nature.

SUMMARY OF ARGUMENT

Surveillance Videos Constitute Evidence that are subject to Pretrial Disclosure and Discovery in accordance with the Federal Rules of Civil Procedure.

ARGUMENT

The advent of the video tape camera in the early 1970's, and the explosive growth of this industry in the 1980's, has introduced a new element into the practice of litigation, namely the increasing usage of surveillance video tapes of plaintiffs seeking damages for personal injuries.

Prior to the 1970's, the practice of obtaining surveillance films of plaintiffs was hard, expensive, and usually non-productive. The only type of camera that

would produce decent images, a 16mm film camera, was large, bulky and not easily camouflaged. Today's equipment, however, requires little expertise, expense or training and is ideally suited for surveillance. These technological advancements have now made video tape surveillance an inexpensive and uncomplicated option for defendants, and has resulted in an increased usage of surveillance as a defense tactic in even the most mundane cases. However, it is respectfully submitted that technological advancement should not be an excuse for ignoring the basic concepts and principles set forth in the Federal Rules of Civil Procedure for discovery, nor should these advancements be an impetus for a return to the days of "**trial by ambush.**"

Reasonable video surveillance is a legitimate method to obtain evidence to defend a lawsuit or to use in the cross examination of a witness. However, it does in all instances constitute evidence, and as such, it should be subject to disclosure with respect to both its existence and its content. A surveillance video produced for the first time at trial may impart a far greater evidentiary weight than it should have or deserve, and if the plaintiff is not given the opportunity to litigate the issues implicit in that video, there is as strong chance that the jury may be improperly influenced through its unrebutted introduction. The Fifth Circuit expressly recognized the prejudicial effect that the introduction of the surveillance video had in Ms. Chaisson's trial:

> "**Zapata contends that admission of the tape, if erroneous, was harmless.... We disagree. Its importance is obvious. Moreover, at oral argument**

> **here, both sides conceded that the case would, in all probability, have settled if Chaisson had known about the video. *Any error having such a fundamental affect on the outcome of the litigation cannot be considered harmless."*** *Chaisson, 988 F.2d @* 518. (emphasis added.)

In this case, Ms. Chaisson was never asked, either in her deposition or at trial, whether she did or did not do any of the specific activities depicted by the video. Had she been asked if she had ever gone shopping, and had she specifically denied ever doing this activity, then a video depiction of her "shopping" certainly would have been impeaching in nature. But until, and unless, this specific question was asked and answered, any video depiction of her shopping went only to the extent of her injuries, and thus, was substantive in nature.

In both a particular and generic sense, the content of all surveillance videos may bear on both impeachment and substantive issues. The tape of a blind man reading a book may show he is not blind (substantive) and, assuming he was asked and lied about being blind, may be indicative of why the jury should not put faith in his testimony (impeachment). The question therefore is whether the intrinsic substantive quality of these videotapes mandate that the existence and content be disclosed in accordance with Rule 26, *et. seq.*, F.R.Civ. P.

The trial court allowed the introduction of the video because it found that it constituted impeachment testimony, and was therefore immune from pretrial disclosure under the District Court's local rules. The Fifth

Circuit, after reviewing the tape, found this conclusion to be unwarranted, because the tape was not being used "solely" for impeachment as required under the local rules.[1]

The Fifth Circuit's decision is supported by the great majority of state and federal courts which have consdered these issues.

In Snead v. American Export, 59 F.R.D. 148 (E.D. Pn., 1973) a three judge Federal District Court considered this precise issue. The *Snead* court found that the main purpose of the film was impeachment and that the film was work product. However, citing the salutary effects of broad discovery, the *Snead* court ruled that the defendant was required to disclose any film it wished to use at trial:

> **"Every need to provide information must be balanced against the need to withhold it.... Any rule to be formulated, therefore, must balance the conflicting interests of the defendant and the plaintiff and protect both... In addition, the objective of the discovery rules must be kept in mind so that a just and speedy determination of cases can be obtained... these purposes can best be achieved by requiring the defense to disclose the existence of surveillance films or be barred from showing them at trial."** *Snead* @ p. 151.

The *Snead* court also acknowledged that the defendant had

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[1] In *Andras v. Pontchartrain Materials, Inc.,* 1990 W. L. 19817 (E.D., La.) the same local rule was relied upon to exclude a video tape surveillance tape from pretrial discovery. See also, *Bogatay v. Montour Railroad,* 177 F. Supp. 269 (W.D. Pn., 1959) and *Hikel v. Abousy,* 41 F.R.D. 152 (D.C. 1966).

an interest in protecting the impeachment value of its surveillance film, and ordered the defendant to produce the film only after the plaintiff had testified by deposition. *Id* @ 151.

The Supreme Court of Florida has expressly adopted the *Snead* concept. Justice Overton, writing for a unanimous court, held that the existence of surveillance movies was discoverable. However, to equalize the respective benefit of surveillance film, and to protect the impeachment characteristic of these films, the Court set forth the following procedural rules:

> "(1) **Existence of surveillance movies and photographs is discoverable in any instance;**
>
> (2) **Contents are discoverable if the materials will be used as evidence either substantively or for impeachment;**
>
> (3) **If movies will not be used as evidence, the contents are discoverable only upon a showing of exceptional circumstances;**
>
> (4) **The party seeking discovery must be afforded a reasonable opportunity to observe the movies or photographs before their presentation in evidence; and**
>
> (5) **The surveilling party has the right to depose the party or witness filmed before being required to produce the contents of the surveillance information for inspection.**

> *Dodson v. Persell,* 390 So.2d 704, 705 (Fla. 1980)."

A similar conclusion had previously been reached by the Supreme Court of New Jersey. *Jenkins v. Rainner,* 350 A. 2nd 473 (N.J., 1976).

The court in *Crist v. Goody,* 507 P. 2nd 478 (Colo. 1972), concluded that "surveillance films are primarily substantive evidence" and not totally or even basically impeachment evidence. *Crist @* p. 48. The *Crist* court found that the film should have been disclosed in pretrial discovery because they were used for the obvious purpose of affirmatively proving the absence of disability of the plaintiff." *Id.*

In *Collins v. the Crosby Group, Inc.,* 551 So.2d (La. App. 1989), a Louisiana appellate court reviewed these various holdings, and concluded that surveillance videos were subject to pretrial discovery. In rejecting any contrary position, the court recognized the unique nature of photographic evidence, particularly video taped evidence:

> **"Documentary evidence is simply much less likely to be forged or altered than a video tape is likely to be edited. Therein lies the problem, because *editing* alone, without any outright trickery, can be very misleading." *Collins, @* p. 44.**

The most recent and, in many ways, the most thorough discussion of the issues being presented in this application was undertaken by the Louisiana Supreme Court. *Moak v. Illinois Central Ry. Co.,* No. 93-C-0783

(Jan. 14, 1994) - App. 1. In *Moak*, the Court was asked to consider two questions: first, could a district court deny a plaintiff's request for production of surveillance films unless and until it becomes evident that the film would be used at trial; second, assuming the trial court could not deny production, was it bound to delay the production until plaintiff's deposition could be taken.

In response to these two questions, the Court concluded that the trial court could not deny production of the surveillance films, and was not bound to permit a defendant to take the plaintiff's deposition prior to ordering the production of any surveillance films, although the trial court was at liberty to do so in the exercise of its discretion.

Although the Louisiana Supreme Court's decision was predicated primarily upon whether or not surveillance films constituted "work product," an issue not raised nor argued by petitioner in the court below,[2] the rationale and discussion of the issues is a perfect blend with the Fifth Circuit's decision in this matter.

Both of these decisions implicitly recognize and stress the importance of continuing the *Hickman* rationale towards a broader and more liberal interpretation of the Rules dealing with discovery, a view which is certainly carried forward in the recent revisions to Rule 26. In essence, Rule 26 and the *Hickman* case and its rationale clearly stand for the proposition that civil litigation should be conducted with the aim of narrowing and clarifying the basic issues between the parties, not fostering a "game of blind

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[2] See, Chaisson, 988 F.2d @ p. 516, fn.5.

man's bluff." By seeking to protect pretrial surveillance films from discovery, the petitioner is asking this court to take a step backwards, a request that frustrates the aim and goal of the Federal Rules of Civil Procedure.

CONCLUSION

The basic premise of the petitioner's argument is that plaintiffs lie and the only means to expose those lies is through the non-disclosure of surveillance videos. Therefore, the petitioner seeks to carve out an exemption from the mandates of Rule 26 for this type of evidence, thereby giving defendants the freedom to present their version of the truth, unhampered by any factual reality. The major problem with this argument is that the protection being sought does nothing to aide the fact-finder in ascertaining the truth; the only one who is aided is the defendant, since it is free to present, or not present, what it pleases.

The case in point is a good example of this. In this case, Mrs. Chaisson was under observation by a private investigator for a total of 129 hours. Approximately four hours of her activity was taped, and from that, a 27 minute portion was played for the jury. By highlighting only that portion which was actually played, the jury was presented with a misleading characterization of Mrs. Chaisson. However, since the defendant was immune from disclosing what was depicted on the three and one-half hours of the tape that was not shown, it was free to argue only on the points it chose to present. This selective truth is of great advantage to the defendant, and it is this advantage which the petitioner desires to maintain. In effect, the petitioner does not want a level playing field, but rather

one which it can tilt to its advantage, at its sole discretion, unhampered by any restrictions which may be imposed through having to disclose the existence of this evidence prior to trial.

Unfortunately, there is some truth in what the defendant states, since people do lie, especially where there is money to be made or lost. However, plaintiffs are not the only one who can be less than truthful in their presentation of facts. Is not selective editing of a video tape a form of falsification? Is not the failure to tape a plaintiff when they are obviously exhibiting signs of pain, discomfort or injury merely a form of selective editing?

If the plaintiff chose to present a "day in the life of" video tape, is there any doubt that this would have to be disclosed prior to trial? Obviously, it would not only have to be disclosed, but the defendants would have the right to view the tape prior to its introduction. What real difference is there between that type of tape and the type that the petitioner seeks to protect from pretrial disclosure? Both are slanted views of the truth since they both emphasize only those points which are of assistance to the proponent. However, both are also capable of distorting the reality. If for no other reason, this should subject them to pretrial disclosure.

In the instant case, there can be little doubt but that the surveillance video was primarily substantive in nature, and therefore should have been disclosed prior to trial. By faling to disclose the tape prior to trial, the petitioner/defendant ensured that there would be no reasonable discussion of this tape by the plaintiff at the start of the

trial, no chance for the plaintiff to review the entire video for a moment supporting her particular claim, and no effective rebuttal once the tape was played. The Fifth Circuit found that the non-disclosure had a fundamental effect on the outcome of this litigation, and thus, that it effected a substantial right. That decision is amply supported by the factual background of the case.

In the larger sense, the petitioner is correct in asserting that the lower courts do need guidance with respect to this issue. This case may well be the vehicle for that guidance, despite the fact that the video in question was not, in fact, impeaching in character. However, a ruling which would authorize non-disclosure of this type of evidence would be contrary to the goals and aim of pretrial discovery, and would only result in an increasing abuse of the process. It is respectfully submitted that a better and more reasoned approach would be that taken by the Louisiana Supreme Court in the *Moak* case discussed previously. This type of approach would protect the interests of both parties and would foster the goal and aim of presenting objective facts upon which judges and jurys could base their decision.

RESPECTFULLY SUBMITTED,

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APPENDIX A

SUPREME COURT OF LOUISIANA

No. 93-C-0783

WOODY RAYMOND MOAK

Versus

ILLINOIS CENTRAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO
THE COURT OF APPEAL, FIRST CIRCUIT,
PARISH OF EAST BATON ROUGE

FILED
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ON REHEARING

CALOGERO, Chief Justice*

Regarding plaintiff's effort to discover surveillance films taken of him by or under the direction of defendant in this injury case, two discreet questions are presented: (1) May the district court judge deny the plaintiff's request for production of the surveillance films unless and until it becomes evident to the court that the film will be used at trial; and (2) Assuming the trial judge may not deny production, is he bound to delay it until plaintiff's deposition is taken.

For the reasons which follow, we conclude, relative to

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* Kimball, J., not on panel. Rule IV, Part 2, §3.

the first question, that the district court judge may not deny production of the surveillance films, and, relative to the second question, that he is not bound to permit defendant to take plaintiff's deposition before ordering defendant to produce the surveillance films, although he is at liberty to do so in the exercise of his discretion. Because it is not clear whether this judge felt legally compelled to rule as he did regarding the timing of production (i.e., deposition first, production possibly later) or, conversely, whether he understood that he had the discretion to order production followed by deposition, we will remand the case for the trial judge to rule anew.

FACTS:

On August 21, 1992, plaintiff, Woody Raymond Moak, filed a Petition for Damages against the Illinois Central Railroad Company, his former employer, pursuant to the Federal Employers Liability Act, 45 U.S.C.§51.[2] He alleged that he injured his back while working as a carman. He was manually transporting an "F-type knuckle" to its final destination from a bin at the Baton Rouge, Louisiana Rip Track. He contends that he was later discharged because of physical limitations resulting from the injury.

In a pre-trial discovery request for production filed

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[2] This federal statute provides in relevant part that "[e]very common carrier by railroad while engaging in commerce ...*shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce* ...for such injury or death resulting in whole or in part from the negligence of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, ... or other equipment." (emphasis added)

with the petition, plaintiff sought "[a]ll photographs, movies or videotapes made after September 2, 1989, showing or depicting Woody Moak." [The alleged injury occurred on September 26, 1989.] Illinois Central's response to this discovery request was to object for the reason that plaintiff was seeking information which was attorney work product prepared in anticipation of litigation.

When the defendant attempted to schedule his deposition, Moak refused to appear until Illinois Central produced all discoverable material, including any surveillance tapes. Illinois Central filed a Motion To Compel Moak to appear for his deposition, whereupon he filed both a Motion For Protective Order for the postponement of the scheduling of the mover's deposition and a Motion To Compel Discovery with regard to one of his interrogatories and regarding certain items on his Request for Production. At a hearing on the motions, the trial judge ordered that Illinois Central's Motion To Compel plaintiff's deposition be granted, that plaintiff's Motion for A Protective Order be denied, and that Illinois Central respond to the Interrogatory and to certain of the Requests for Production, but not the request for movies or videotapes. In his oral reasons, the trial judge stated that he would reconsider the production of the surveillance film at the pre-trial conference, which was to be scheduled after the deposition. Should it appear at that time that the surveillance films would be used as exhibits at trial, production would then be required, he said.

Citing *Collins v. The Crosby Group, Inc.*, 551 So. 2d 42 (La. App. 1st Cir. 1989), *cert. denied*, 556 So. 2d 39 and 42 (La. 1990), the court of appeal denied plaintiff's applica-

tion for supervisory writs.[3] This Court, however, granted his application and issued a peremptory order, staying plaintiff's deposition until after defendant produces the surveillance film. On defendant's application, we granted a rehearing to reconsider that action. *Moak v. Illinois Central Railroad*, 618 So. 2d 398 (La. 1993).

DISCOVERY

This Court, in *Hodges v. Southern Farm Bureau Casualty Insurance Co.*, 433 So. 2d 125, 129 (La. 1983), has said that:

> [t]he basic objectives of the Louisiana discovery process are (1) to afford all parties a fair opportunity to obtain facts pertinent to the litigation, (2) to discover the true facts and compel disclosure of these facts wherever they may be found, (3) to assist litigants in preparing their cases for trial, (4) to narrow and clarify the basic issues between the parties, and (5) to facilitate and expedite the legal process by encouraging settlement or abandonment of less than meritorious claims.

To achieve these objectives, the courts are to construe the

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[3] After reviewing the Louisiana discovery rules and national jurisprudence, the First Circuit Court of Appeal in *Collins* concluded that the plaintiff *was* intitled to discover, *prior to trial*, impeachment evidence in the form of surveillance videotape taken by the defendant's investigator. This is the only *holding* in *Collins*, although the court did cite cases in other jurisdictions which had concluded that any inconsistency between plaintiff's allegations and the film might be preserved by taking the deposition of the plaintiff prior to the production of the film. *Id.* at 44.

discovery statutes liberally and broadly, *Id.* (citing *Hickman v. Taylor,* 329 U.S. 495 (1947); *Burns v. Thiokal Chemical Corp.,* 483 F.2d 300 (5th Cir. 1973); 8 Wright & Miller, Federal Practice and Procedure, § 2001, p. 17 (1970 ed.)).

The objectives of discovery may be accomplished by several methods. According to La. Code Civ. Proc. Ann. art 1421 (West 1984), parties may obtain discovery through depositions, written interrogatories, production of documents or things or permission to enter upon land or other property, physicial and mental examinations, and requests for admission. Article 1461 allows any party to request the production, inspection, and duplication of designated documents including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations and to inspect and copy, test, or sample any tangible things which constitute matters within the scope of discovery.

The scope of discovery in Louisiana is addressed in Articles 1422-1425 of the Code of Civil Procedure. According to Article 1422, "[p]arties may obtain discovery regarding *any* matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party," and even if "the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." (emphasis added)

On the other hand, "a writing" may be immune from discovery under La. Code Civ. Proc. art. 1424 (West 1984)[4] if it has been "obtained or prepared by the adverse party, his attorney, surety, indemnitor, expert, or agent in anticipation of litigation or in preparation for trial." For such writings, an exception to this immunity is made by Article 1424; however, if the trial court is "satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice." Nevertheless, Article 1424 prohibits the production "of any part of the writing that reflects the mental impressions, conclusions, opinions, or theories of an attorney or an expert."

Thus, even if Article 1424's qualified immunity for trial preparation writings were to be applicable to tangible things such as film, it is worth noting that the absolute protection traditionally afforded attorney work product has eroded in recent years. *Jenkins v. Rainner,* 69 N.J. 50, 350 A. 2d 473, 475 (1975). Other than an attorney's mental im-

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[4] Based on an amendment suggested by the Federal Committee on Rules of Civil Procedure but not adopted by the Supreme Court of the United States, Article 1424 was originally enacted in 1952 as part of La. Rev. Stat. § 13:3762, "Orders for the protection of parties and deponents." Known as the "Hickman Amendment," this Louisiana statute clarified and broadened the scope and effect of *Hickman v. Taylor,* 329 U.S. 495 (1947), which held that the work product of an attorney was not discoverable without a showing of good cause. The federal "work product" rule, Rule 26(b) (3), was added to the Federal Rules of Civil Procedure in 1970. According to the "Notes of Advisory Committee on 1970 amendments to Rules," the Supreme Court appeared to have expressed a preference in the 1947 *Hickman* case to handle the problem of trial preparation materials by judicial decision rather than by rule, but reconsidered that position in view of difficulties by the lower courts in applying the *Hickman* decision.

pressions, conclusions, opinions, or legal theories concerning litigation, it is difficult to conceive of any non-privileged, relevant material which is so protected against discovery. *Id.*

More to the point, however, and obviating any need to focus on the exception to immunity based upon unfair prejudice, undue hardship or injustice, is the fact that Article 1424 specifically excludes from discovery only "any *writing* obtained or prepared ...in anticipation of litigation or in preparation for trial."[5] Thus, Louisiana's "work product" exclusion applies only to a "writing" and does not include tangible things such as videotapes, films or photographs.[6] In contrast, Fed. R. Civ. P. 26(b) (3) permits the discovery of "documents *and* tangible things

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[5] We acknowledge the existence of a Rhode Island Supreme Court decision which is at variance with the position we take here. *Cabral v. Arruda*, 556 A.2d 47 (R.I. 1989). The Rhode Island statute closely resembles our own. In defining what items may be classified as work product, the Rhode Island rule provides in pertinent part that "[a] party shall not require a deponent to produce or submit for inspection *any writing* obtained or prepared by the adverse party, his attorney ...in anticipation of litigation ...unless ...a denial of production will result in an injustice or undue hardship." In order to make the scope of its "work product" rule comport with its federal counterpart, the Rhode Island Supreme Court determined it should be interpreted expansively. We are not compelled to, and do not, adopt such a position.

[6] Proponents argue that surveillance film is the functional equivalent of an investigator's written report and thus qualifies as work product. Assuming, contrary to our holding here, that surveillance film qualifies as a "writing," it would still not be exempt from discovery if the party under surveillance will be unfairly prejudiced or suffer undue hardship or injustice. A review of the arguments advanced by the surveilled parties seeking discovery supports their claims of inherent injustice and prejudice if the surveillance materials are not made available to them. The films are unique as to the actual events of the occasion when they were made, since the plaintiffs may well not recall the particular events,

...prepared in anticipation of litigation or for trial...only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." (emphasis added) Although Louisiana discovery rules are based in large part on the Federal Rules of Civil Procedure, we note that our codal provision, (La. Code Civ. Proc. art. 1424) which limits the "work product" immunity to writings, pre-dates the federal rule by eighteen years, and that, throughout its history, other Louisiana discovery provisions (but not Article 1424) have specified that both documents and "tangible things" are subject to discovery through a request for production of documents. Therefore, it can hardly be argued that the use of the term "writing" was routinely employed by our Legislature to encompass both writings and tangible things. Furthermore, despite the Legislature's 1976 comprehensive amendments to the Louisiana discovery provisions, which amendments followed the enactment of Fed. R. Civ. P. 26(b) (3), with its reference to tangible things as well as documents, Louisiana's "work product" rule at Article 1424 was not changed.

It is also clear that the objectives of pretrial discovery are enhanced by production of the films. When

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footnote 6 continued.

and such are obtainable only from the defendants. In order to dispute distortion or misidentification in the films, the plaintiffs also have a substantial need to view the film. Furthermore, films may be misleading if the action is slowed down or speeded up, and if editing and splicing change the chronology of events. Therefore, plaintiffs should have the opportunity to have an expert determine the accuracy of the depiction of the events filmed, some time before trial.

a plaintiff is claiming personal injury, a film, videotape or photograph taken surreptitiously of his activities by or at the direction of the adverse party is highly relevant with regard to the nature and extent of that injury and is likely to have a dramatic impact in court. The rationale for liberal pre-trial disclosure is "to make trial 'less a game of blind-man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent.' " *Daniels v. National Railroad Passenger Corp.*, 110 F.R.D. 160, 161 (S.D.N.Y.1986) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)). Discovery serves to eliminate prejudice from the surprise disclosure of evidence. While it has been suggested that surprise may have "a healthy prophylactic effect against possible perjury," it is more likely that the adversarial process will function efficiently and cases will be decided fairly on the merits if the parties are aware of all of the evidence. Furthermore, discovery of surveillance materials permits the kind of stipulations and admissions required for effective pre-trial procedures. *Martin v. Long Island Rail Road Co.*, 63 F.R.D. 53,54 (E.D.N.Y.1974). It also encourages settlement or abandonment of less than meritorious claims. Even where surveillance materials ("tangible things") are within the "work product" exclusion from discovery (unless substantial need is shown) in accordance with the Federal Rules of Civil Procedure's counterpart to Article 1424, it has been held that permitting their discovery is consistent with the modern trend which permits full disclosure and narrowly construes limitations, particularly where no prejudice is shown. *Marte v. W. O. Hickok Mfg. Co., Inc.*, 154 A.D. 2d 173, 552 N.Y.S.2d 297, 299 (1990). "Our court system has long been committed to the view that essential justice is better achieved when there has

been full disclosure so that the parties are conversant with all the available facts." *Jenkins v. Rainner,* 350 A.2d at 476.

Since surveillance films, videotapes, or photographs are not included in Louisiana's limited "work product" exclusion from discovery and since broad discovery is encouraged to promote the objectives of the procedure, we find that these materials are discoverable prior to trial. Furthermore, in view of our broad discovery laws, which permit the discovery of information that is not admissible at trial as long as it appears reasonable calculated to lead to the discovery of admissible evidence, we conclude that surveillance film is discoverable whether or not it is going to be used at trial.[7]

An additional, more pertinent and narrow question specifically presented in this case concerns the timing of the production or inspection. At issue is whether the trial judge had the discretion to order production of surveillance film before deposition or, to the contrary, to order production of the film only after plaintiff's deposition is taken. What is clear is that, in this case, the trial judge did the latter. He ordered that the deposition be taken, and he denied plaintiff's request for a protective order which would have stopped the deposition until after production. What is not clear is whether he believed he had a choice or, on the other hand, believed he was required to rule as he did. His oral expressions when he ruled indicated that he may have believed that the law prevented him from allowing discovery

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[7] Thus, the district court's ruling that discovery of surveillance film is permissible only if the defendant indicates at the pre-trial conference that he intends to use the material at trial must be reversed.

before the deposition.[8]

As with the earlier question of whether surveillance films are susceptible of discovery all, our Court has not addressed the matter of the timing of the discovery of this material. One Louisiana court of appeal decision, *Collins v. The Crosby Group, Inc.*, 551 So. 2d 42, while holding that surveillance film is discoverable before trial, made mention of national jurisprudence which suggested that inconsistencies between plaintiffs' allegations and surveillance films could be preserved by taking the deposition of the plaintiffs prior to the production of the films. *Id.* at 44. But the *Collins* court of appeal panel did not have before it the narrow question regarding the timing of production, which is presented here.

It is generally conceded that if the adversarial process is to function efficiently, the discovery of surveillance materials should be timed to permit plaintiff the opportunity to test at least the manner and means by which the surveillance was conducted. *Boyle v. CSX Transp., Inc.*, 142 F.R.D. 435, 437 (S.D.W.Va.1992). However, in applying the exception to the "work product" doctrine found in the Federal Rules of Civil Procedure, the majority of the

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[8] In his oral reasons the judge stated:

> Until that time [when, in the pre-trial order, the defendant indicates its intent to use the surveillance film], *I don't think it is discoverable.* You follow? ...
>
> In other words, *if he is not going to use it, it ain't discoverable.* (emphasis added) Record at 72 E.

federal district courts surveyed have agreed that surveillance films are discoverable only after the taking of the plaintiff's deposition or after a reasonable period of time within which the deposition should have occurred. *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 151 (E.D. Pa. 1973); *Blyther v. Northern Lines, Inc.*, 61 F.R.D. 610, 611-2 (E.D. Pa. 1973); *Martin v. Long Island R.R.Co.*, 63 F.R.D. 53 (E.D. N.Y. 1974); *Daniels v. National R.R. Passsenger Corp.*, 110 F.R.D. 160, 161 (S.D.N.Y. 1986); *Forbes v. Hawaiian Tug & Barge Corp.*, 125 F.R.D. 505 (D. Haw. 1989); *Boyle v. CSX Transp., Inc.*, 142 F.R.D. 505 (S.D.W. Va. 1992). Furthermore, as a general proposition, some state appellate courts have found that considerations of simple fairness and full discovery for both sides permits the disclosure of surveillance materials to be delayed until the surveilling party has had the opportunity to depose the adversary fully. *Dodson v. Persell*, 390 So.2d 704 (Fla. 1980); *Jenkins v. Rainner*, 350 A. 2d 473; *Marte v. W.O. Hickok Mfg.. Co., Inc.*, 154 A.D. 2d 173, 552 N.Y.S 2d 297 (1990). These cases, however, speak in terms of the trial court's discretion rather than duty to allow the discovery deposition before disclosure.

Furthermore, we have uncovered no case nationally, particularly none in Louisiana, where the district court has exercised discretion to require pre-deposition disclosure, and the appellate court has found legal error in that ruling. Consequently, there is no jurisprudence at all, much less persuasive jurisprudence, to instruct us in this situation. We focus, therefore, on the explicit Louisiana discovery provisions.

As earlier recited in the opinion, the basic objectives of the Louisiana discovery process are to allow parties to obtain pertinent facts, to discover true facts and to compel their disclosure, to assist in trial preparation, to narrow and clarify the issues, and to encourage settlement or abandonment of claims lacking merit. Among the methods employed to reach these objectives is the request by one party for the production and inspection of documents and tangible things within the scope of discovery and in the possession of the party upon whom the request is served. Since courts are to construe liberally and broadly the discovery statutes, including those provisions addressing the scope of discovery, any relevant information, not privileged, whether or not admissible at trial, whether documents or tangible things, is discoverable.

It is well established that trial courts in Louisiana have broad discretion when regulating pre-trial discovery, which discretion will not be disturbed on appeal absent a clear showing of abuse. *Folds v. Red Arrow Towbar Sales,* 378 So.2d 1054, 1057 (La. App. 2d Cir. 1979) (citing *Madison v. Travelers Insurance Co.,* 308 So. 2d 784 (La. 1975)). As for the discovery of surveillance materials, we can discern no difference between this and the discovery of any other evidence, and we reaffirm that rule.

Accordingly, the trial judge has the discretion to determine the appropriate timing for the pre-trial discovery of surveillance materials. Mindful of the parties' competing considerations and the objectives of discovery, the trial court may determine in any particular factual situation when the production of surveillance films, tapes or photographs will most likely assist the search

for truth.

In this case, it appears that the trial judge believed that surveillance materials were not discoverable unless they were to be used at trial. Since we here interpret for the first time the relevant Louisiana provisions concerning discovery, we remand the case to the trial court to rule anew in accordance with the principles discussed in this opinion.

DECREE

For the foregoing reasons, we vacate and set aside our original writ grant with peremptory order; reverse the judgment of the district court; and remand to the district court to rule anew on defendant's Motion To Compel plaintiff to appear for his deposition and on plaintiff's Motion For Protective Order, guided by this opinion and the reasons expressed herein.

ORIGINAL JUDGMENT VACATED:
JUDGMENT OF THE DISTRICT COURT REVERSED:
REMANDED

SUPREME COURT OF LOUISIANA

NO. 93-C-0783

FILED
JAN 14 1994

WOODY RAYMOND MOAK

V.

ILLINOIS CENTRAL RAILROAD COMPANY

MARCUS, Justice (Concurring in part and dissenting in part)

I agree with the majority's holding that the trial court may not deny production of surveillance films prior to trial. However, I disagree with the majority's holding that the trial court has the discretion to order production of the films prior to the plaintiff's deposition. In my view, the concept of fairness requires that the film not be produced until after the plaintiff's deposition. See *Dodson v. Persell*, 390 So. 2d 704 (Fla. 1980). Accordingly, I respectfully dissent from this portion of the majority opinion.